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No. 87-508

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE MIAMI HERALD PUBLISHING COMPANY,
Petitioner,

vs.

THE HONORABLE RICHARD BRYAN BURK, LINDA AURILIO, and THE STATE OF FLORIDA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner The Miami Herald Publishing Company files this reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida.

REPLY TO RESPONDENTS'[1] STATEMENT OF THE CASE

The State does not dispute that Florida's criminal justice system is essentially a pretrial process in which more than 97% of all prosecutions are resolved without trial. The State does not question that defendants' expansive discovery rights play a central role in these pretrial dispositions. It does not challenge the fact that the criminal deposition is frequently the only "public window" on this process. Nor does the State address the structural value of public access to criminal deposition transcripts demonstrated in the Petition. Indeed, Respondent Hagler candidly acknowledges the importance of access. Hagler Br. 12-13. The State concedes that in spite of these facts the Florida Supreme Court adopted a per se rule "that the press does not have a First Amendment right . . . to demand copies of depositions which are not filed with the trial court" and in so doing "relied on this Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), wherein the *Times*, a party to a lawsuit, was accorded *no constitutional right* to publish information acquired solely by virtue of the pretrial process." State Br. 2 (emphasis added). Thus, the parties do not dispute that the Florida Supreme Court has adopted a per se ban on access to transcripts of a

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1. Respondents the State of Florida and the Honorable Richard Bryan Burk are hereinafter referred to collectively as the "State." Citations to the State's Brief in Opposition are indicated by "State Br. ....." Citations to the Brief in Opposition of Respondent John W. Hagler in companion Case No. 87-510 are indicated by "Hagler Br. ....." Petitioner The Miami Herald Publishing Company has not filed a separate reply in the companion case, *Miami Herald Publishing Co. v. Hagler* ("*Hagler*"), and *Miami Herald Publishing Co. v. State* ("*State*"), Case No. 87-510, and notes that the State has not filed a brief in opposition in that case either.

critical Florida criminal procedure based upon its interpretation of a federal constitutional holding of this Court.

The State explains that the decision of the Florida Supreme Court "expressed deep concern that public access to discovery information *at the moment it is produced* in a deposition presented an unacceptable hazard" to fair trial and privacy rights. State Br. 3 (emphasis added). But the State offers no explanation of why the court believed *transcripts* of criminal depositions should not be made available subsequent to the taking of the deposition. Access to transcripts may be regulated efficiently through appropriate protective orders, thereby eliminating the problems allegedly created by attendance at depositions. The State also fails to acknowledge that criminal depositions routinely are filed with the court, thereby becoming public records, without presenting any hazards. Nor does the State explain why the act of filing with the court eliminates these purported hazards. Criminal depositions most often relate to the lawfulness of the manner in which material evidence is obtained, the conduct of law enforcement officers, or the truthfulness and credibility of key prosecution witnesses. While they are crucial to public understanding of the case, they do not generally, let alone uniformly, threaten any subordinating constitutional interests.

The State asserts that access to unfiled deposition transcripts would not serve "the purpose of criminal discovery in Florida—assisting in the trial or resolution of criminal charges". State Br. 3. But it does not even address, let alone refute, the contention that such access is necessary to public understanding, acceptance, and trust in those "resolutions." *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 570-73 (1980).

The State does not directly deny that journalists have traditionally enjoyed access to depositions taken in criminal prosecutions. Instead the State claims that certain unspecified "assertions . . . are not based on the record," and disputes these "representations about historical access" in two respects. State Br. 4. First, the State notes that Florida's procedural rules do not require that all depositions be transcribed and that "[t]here is no record evidence that tells us how many depositions were filed in criminal cases over any period of time." State Br. 5-6. Consequently the State "cannot agree that public access was assured or that depositions were 'routinely reported.'" *Id.* at 6. Second, the State asserts there is no "record evidence" to support the assertion that Florida has had " 'extensive experience with allowing access to depositions'." *Id.* The State claims the only historical evidence offered is the citation of five criminal cases, none of which dates back any earlier than 1979. *Id.* at 7.

Both of the State's contentions are meritless. Whether the press historically had access to untranscribed depositions is irrelevant to this case. The rule adopted by the Florida Supreme Court bars access to unfiled depositions "which may or may not have been transcribed." State Br. i; *Burk*, App. 5-6. Thus *Burk* bars access to both transcribed and untranscribed depositions. The State cannot rely on the putative lack of "record evidence" of historical access to one class of depositions to justify the denial of access to all. Moreover, transcribed depositions were historically filed, and the press enjoyed access to them.

The State's second contention is simply absurd. All parties concede that a great many deposition transcripts are filed in Florida criminal prosecutions. In fact, depositions must be filed if they are to be considered by the court

in any matter pending before a Florida court. All parties concede that, upon filing, such transcripts are public records. Florida's experience has revealed no problems with this procedure. The hazards to fair trial and privacy rights envisioned by the State have never materialized.

By lack of "record evidence" the State can only mean the specific records of the criminal cases which are the subject of this Petition and its companion.[2] Yet the record in each case demonstrates a presumptive right to attend the depositions themselves. In *State,* the press attended all of the depositions over the State's objections. Petition at 15. In *Hagler,* the press attended the depositions until the State Attorney himself was to be deposed. Petition at 13. In *Burk,* the case began with a motion for a protective order to exclude the press. Petition at 8. It was not until this motion was denied that the parties made what was then a novel argument—that the press had *no right* to attend the deposition or obtain a transcript.

Most telling, the State does not even allude to any fact in any deposition in the record which might have compromised the privacy or fair trial right of any party. The State simply claims the power to exclude the public even where *no* such rights are threatened.

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2. In fact, there is a clear record of the history of deposition access in the court below. The Miami Herald placed before the Florida Supreme Court clear historical evidence of the intent of the drafters of the Federal Rules of Civil Procedure (on which the Florida rules are modeled) gleaned from the notes of the drafters maintained in document repositories around the country. This evidence demonstrated that the drafters presumed that the public would be permitted access to depositions and that the protective order mechanism was developed to respond to this eventuality. *See* Initial Brief of The Miami Herald Publishing Company in the Supreme Court of Florida at 9-19.

The State is mistaken as to the number of reported cases and the significance of their vintage. Prior to the adoption of the "housekeeping rule" in 1981, which ended Florida's practice of routinely filing depositions in the public court file, there was little occasion for litigating deposition access cases. As to the number of criminal deposition access cases reported, sixteen, not five, are cited in the Petition.[3] Contrary to the State's suggestion, prior to *Burk*, the Florida press reported the contents of criminal depositions without incident.

REPLY TO RESPONDENTS' ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT

The State offers three basic arguments against granting the writ. It asserts that *Burk* correctly held there is no First Amendment right of access to deposition transcripts; that *Burk* is not in conflict with the decisions of other courts; and that access to deposition transcripts would compromise privacy and fair trial rights, while burdening criminal defendants with collateral litigation. Each of these claims is mistaken.

The correct rule of law which has emerged from *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and its progeny is that third-party access to discovery materials may be denied without violating the First Amendment only pursuant to a protective order entered on a showing

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3. Eight, not five, criminal trial court cases are cited in footnote 3 of the Petition alone. An additional three appellate decisions are cited in footnote 5 of the Petition; two more appellate decisions are cited in footnote 13 of the Petition; and these numbers do not include the three cases pending on review before this Court.

of "good cause." Petition at 16-21. This rule follows all significant precedent. *See, e.g., National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423 (6th Cir. 1981); *Wilk v. American Medical Association*, 635 F.2d 1295, 1299 (7th Cir. 1980). The decision of the Florida court holds that public access to unfiled criminal depositions may be denied without violating the First Amendment even if no protective order has been sought or could be secured. This is error. Access to any phase of the state's criminal justice process is a function of the state's experience with, and the structural value of, such access. The decision below departs from this Court's access jurisprudence.

Moreover, the State is simply mistaken in suggesting that the decisions relied upon in the Petition for conflict address access to *filed* discovery materials. In fact, none of those cases focus on the event of filing and most involve the very issue raised in *Burk*—public access to *unfiled* discovery materials. The State's citation of *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986), is illustrative. In that case, the press challenged the entry of a protective order which restricted public access to *any* "information obtained through discovery." *Id.* at 5. Relying on this Court's decision in *Seattle Times*, the First Circuit upheld the protective order because it was based on a showing of "good cause." The State nonetheless contends that *Anderson* is inapposite. The basis for this contention is another, entirely independent holding reached by the *Anderson* court concerning public access to certain *filed* discovery materials. *Id.* at 11-12. The State's remaining attempts to distinguish the decisions cited in the Petition are similarly flawed.[4] Other cases, such as

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4. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987) (ordering unfiled discovery

(Continued on following page)

Tavoulareas v. Washington Post Co., 737 F.2d 1170, 1172-73 (D.C. Cir. 1984), the State does not even address.

Since the preparation of the Petition in this case, the Sixth Circuit has joined the First, Second, Third, Seventh, Eleventh and District of Columbia Circuits in construing *Seattle Times* to require a showing of "good cause" to limit public access to *unfiled* discovery materials. In *Courier-Journal v. Marshall,* 828 F.2d 361 (6th Cir. 1987), the Sixth Circuit upheld a protective order "sealing deposition testimony" which revealed the identities of certain individuals belonging to the Ku Klux Klan. *Id.* at 364. The court held that the First Amendment associational rights of the named individuals constituted "good cause" to limit public access. *Id.*

Finally, the State's contention that access to unfiled deposition transcripts would compromise privacy and fair trial rights and create burdensome collateral litigation proves both too much and too little. The argument proves too much because it would apply with equal force to filed and unfiled transcripts. Yet thousands of criminal depositions are filed each year in Florida, and none of the problems asserted by the State have surfaced. These depositions are all public records. In fact, courts have upheld third-party access to discovery materials because such access promotes judicial economy. *See, e.g., Wilk v. American Medical Association, supra.* Clearly, public

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Footnote continued—

materials produced pursuant to protective order unsealed); *In re Alexander Grant & Co. Litigation,* 820 F.2d 352 (11th Cir. 1987) (press sought reconsideration of protective order restricting disclosure of designated unfiled discovery materials); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986) (ordering review of protective order restricting public access to unfiled discovery materials).

In re Reporters Committee for Freedom of the Press, 773 F.2d 1325 (D.C. Cir. 1985), which the State cites for its lack of conflict with *Burk*, was not cited for direct conflict by The Miami Herald in the Petition.

access to depositions has long since passed the test of experience.

The State's argument proves too little because it depends in large part on the asserted "surprise" and unpredictability of discovery depositions. This argument, however, can only militate against *attendance* at depositions; it has no force with respect to transcripts of depositions already taken. Only by attempting to conflate, as did the Florida Supreme Court, the issue of transcript access and deposition attendance can the State conjure up even a colorable claim that transcript access carries the potential for any harm. Once a deposition has been taken and transcribed, the protective order mechanism functions equally well to protect the rights of the parties, whether the transcript is filed or not. In these circumstances, the First Amendment must guarantee the public at least the protection of the "good cause" standard.

CONCLUSION

Petitioner The Miami Herald Publishing Company respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petitioner's Reply Brief was served on November 6, 1987, in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in a United States post office or mailbox, with first-class postage prepaid, addressed to:

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